# In the Supreme Court of the United States

OCTOBER TERM, 1972

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No. 72-49

FRANK FRANKEL, ET AL., PETITIONERS

*v.*

SECURITIES AND EXCHANGE COMMISSION, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported. The opinion of the district court (Pet. App. A) is reported at 336 F. Supp. 675.

### JURISDICTION

The judgment of the court of appeals was entered on May 4, 1972. The petition for a writ of certiorari was filed on July 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the exemption from the disclosure requirements of the Freedom of Information Act for "investigatory files compiled for law enforcement purposes"

continues after the investigation has been completed and enforcement action is not imminent.

## STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in part:

> (a) Each agency shall make available to the public information as follows:
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> (3) * * * [E]ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *
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> (b) This section does not apply to matters that are—
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> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency * * *.
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> * * * * *

## STATEMENT

In March 1971, the Securities and Exchange Commission brought an action against Occidental Petroleum Corporation and its president, Armand Hammer, and obtained an injunction by consent against future violations of the antifraud provisions of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b–5 thereunder, 17 C.F.R. 240. 10b–5.[1] Thereafter, petitioners, shareholders of Occi-

[1] *Securities and Exchange Commission* v. *Occidental Petroleum Corp.*, S.D. N.Y., No. 71 Civ. 982 (March 5, 1971).

dental, initiated a class action for damages against Occidental and Hammer and formally requested the Commission to show them the investigatory file upon which the agency's action had been based (A. 34–42).[2] When the Commission declined to do so,[3] the petitioners instituted an action in the United States District Court for the Southern District of New York seeking to compel disclosure pursuant to the Freedom of Information Act, 5 U.S.C. 552. The Commission moved for summary judgment on the ground that the records requested were exempt from the disclosure requirements of the Act under the exemption covering "investigatory files compiled for law enforcement purposes * * *," 5 U.S.C. 552(b)(7).[4]

[2] "A." refers to the Appendix in the court of appeals, a copy of which has been lodged with this Court.

[3] The Commission made available to petitioners the names and addresses of persons who had given sworn testimony during the investigation. The record does not disclose whether petitioners have ever sought to obtain copies of the transcripts from them.

[4] The Commission's answer (A. 46–49) also set forth the defenses that information obtained in the investigation was protected against disclosure as "trade secrets and commercial or financial information obtained from a person and privileged or confidential," pursuant to 5 U.S.C. 552(b)(4), and that under 5 U.S.C. 552(b)(3) the records were "specifically exempted from disclosure by statute"—namely, the Trade Secrets Act, 18 U.S.C. 1905. The Commission further alleged that to the extent petitioners had requested "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," the records requested were exempt from disclosure pursuant to 5 U.S.C. 552(b)(5).

The district court denied the Commission's motion. It did not question that the requested investigatory file had been "compiled for law enforcement purposes," in the sense that law enforcement was the purpose for which the information contained in the files had been gathered; but, apparently because the Commission declined to reveal the status of its investigation,[5] the court assumed that the Commission's "investigation ha[d] concluded" (Pet. App. A 6). It held (*ibid.*, emphasis added):

> * * * absent some affirmative act by the agency to *maintain* the file as a legitimate one "compiled for law enforcement purposes" the Commission has not demonstrated * * * that the files *any longer* enjoy exemption under § 552(b)(7).

The district court therefore ordered disclosure of those records that the Commission did not claim to be exempt under other provisions (A. 67–69).[6]

The court of appeals reversed, with one judge dissenting. The court noted first that "[t]he statute on its face does not limit the 'investigatory files' exemption to files that the agency is currently using or is planning to use in a law enforcement proceeding"

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[5] Except in the context of an enforcement action, the results of an investigation are ordinarily not revealed. This is to avoid impairing prospective enforcement efforts and to assure the continued vitality of the Commission's information-gathering procedures.

[6] Decision on petitioner's motion for an order compelling disclosure of all of the investigatory file was deferred pending determination of whether specific contents were protected either under the "confidential" exemption, 5 U.S.C. 552(b)(4), or as "intra-agency memoranda," 5 U.S.C. 552(b)(5).

(Pet. App. B 6). Looking next to the legislative history of the exemption, the court found that its purpose was both to prevent premature disclosure of the agency's case and to preserve the confidentiality of its investigatory procedures (Pet. App. B 10). It therefore concluded that, while the disclosure requested by petitioners would to a limited extent advance the general purpose of the Act—*i.e.*, "the better informing of the electorate as to the operations of government"—it would at the same time "defeat important purposes of the exemption for investigatory files" (Pet. App. B 11).[7]

**ARGUMENT**

The decision of the court below was correct and there is no cause for further review by this Court.

1. Petitioners contend that "[t]he Act's legislative history * * * shows clearly that the 'investigatory files' exemption was not intended to apply after the underlying investigation had terminated" (Pet. 9). The dissenting judge below took the somewhat differ-

[7] The court stated (Pet. App. B 11):

"If an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. The agency's investigatory techniques and procedures would be revealed. The names of people who volunteered the information that had prompted the investigation initially or who contributed information during the course of the investigation would be disclosed. The possibility of such disclosure would tend severely to limit the agencies' possibilities for investigation and enforcement of the law since these agencies rely, to a large extent, on voluntary cooperation and on information from informants."

ent position that the exemption terminates when it is decided that no further enforcement action will be taken by the agency (Pet. App. B 14–15). The statute, however, exempts from disclosure "investigatory files compiled for law enforcement purposes" and makes no reference to whether the investigation has been completed or whether further enforcement action is contemplated. "A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding." *Cowles Communications, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal.).

The legislative history does not support petitioner's contention that the exemption terminates when the investigation is completed. Although an exemption for investigatory files was originally proposed for the limited purpose of protecting against premature disclosure of the government's case in court,[8] that narrow language was rejected on the floor of the Senate in the 88th Congress in favor of language substantially identical to that ultimately adopted as part of the

[8] An exemption considered by the Senate Committee on the Judiciary in the 88th Congress would have covered "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein * * *," S. 1666, as amended, 88th Cong.; 110 Cong. Rec. 17087. Reporting the bill in that form the Committee noted: "The exemption covers investigatory files in general, but is limited in time of application." S. Rep. No. 1219, 88th Cong., 2d Sess., p. 14.

Act by the 89th Congress.[9] Some courts, in decisions relied upon by the dissenting judge below (Pet. App. B 14–15), have correctly observed that the original purpose continues to be served by the broader language of the Act as passed. But this hardly suggests that the court below erred in recognizing an additional purpose of the exemption: to preserve the confidentiality of the procedures by which the agency conducted its investigation and obtained its information. This purpose could, of course, be frustrated if disclosure were required upon completion of an investigation or upon a determination that no further enforcement action will be taken in the particular case.

If, for the reasons petitioners assert, the investigatory files exemption were unavailable here, it is difficult to see why the files of the FBI could not similarly be examined by "any person," contrary to the express understanding of the Congressional Committees that recommended passage of the Act.[10] Moreover, under petitioners' theory the government could not ordinarily

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[9] After the Senate had passed the bill in the 88th Congress, Senator Humphrey moved for reconsideration and offered an exemption that would have covered "investigatory files" without qualification. Senator Long found this suggestion "valuable" and offered, as a substitute to accomplish the same objective, the language that was finally adopted by the next Congress. See 110 Cong. Rec. 17667–17668.

[10] H. Rep. No. 1497, 89th Cong., 2d Sess., p. 2; S. Rep. No. 813, 89th Cong., 1st Sess., p. 3; 112 Cong. Rec. 13659. See also the President's comments upon signing the bill, contained in Committee Print, Senate Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary, "The Freedom of Information Act" (Ten Months Review), 90th Cong., 2d Sess., p. 5 (1968).

protect the identity of informants, which the investigatory files would reveal.[12]

The court below thus properly concluded that the Act's purposes would not be served by requiring disclosure of investigatory files when the investigation terminates or when the agency decides to take no further enforcement action. See also *Evans* v. *Department of Transportation*, 446 F. 2d 821 (C.A. 5), certiorari denied, 405 U.S. 918; *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726 (N.D. Cal.).[13]

2. The court's decision is not in conflict with that of any other court of appeals. Contrary to petitioners' assertion (Pet. 6), with which the dissenting judge apparently agreed (Pet. App. B 14), there is no conflict with *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935 (C.A. D.C.), certiorari denied, 400 U.S. 824. The question there was not the vitality of

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[12] Petitioners assert that "[i]n this case, the SEC has already revealed the identity of its informants" (Pet. 7). The Commission does not voluntarily reveal even whether a confidential informant exists, much less his identity, and has not done so here. The fact that the Commission has often been willing to disclose the names of witnesses who formally testified under oath in its investigation has nothing whatever to do with revealing the identity of informants who might thereby be placed in jeopardy.

[13] The exemption permits disclosure of the files "to the extent available by law to a party other than an agency." This provision, which was intended to require disclosure of the prior statements of witnesses called in an enforcement proceeding (see 110 Cong. Rec. 17667–17668), is not applicable here.

the exemption after an investigation and enforcement proceedings have been terminated; it was whether the particular files had been compiled for law enforcement purposes as contrasted with rulemaking purposes.[14] The court noted that what had commenced as an investigation for the purpose of adjudicatory law enforcement proceedings had turned into an investigation for rulemaking purposes some two years before the request for disclosure. In these circumstances, it held that in order to sustain its burden of showing the applicability of the exemption, the agency must show a current intention to use the files for enforcement purposes. The decision thus does not speak to the problem in the instant case, where the files were unquestionably compiled for law enforcement purposes.

Similarly, the holding in *Wellford* v. *Hardin,* 444 F. 2d 21 (C.A. 4), also relied upon by petitioners, was that the records in question—"[w]arning letters and reports of detention" addressed to meat and poultry packers—were not part of an "investigatory file" in the sense contemplated by the Act. They were instead "records of administrative actions taken to enforce the law" (444 F. 2d 24–25). There is no conflict with the decision below, because it is unquestioned that the files here contain the fruits of the agency's information-gathering efforts directed toward law enforcement.

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[14] The "threshold question" was "whether the files sought by Bristol-Myers relate to anything that can fairly be characterized as an enforcement proceeding" (424 F. 2d at 939).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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